Ontario Energy Board

Commission de l’Énergie de l’Ontario

EB-2011-0316

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Schedule B);

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance and an Administrative Penalty against Summitt Energy Management Inc., Licence Numbers ER-2010-0368 and GM-2010-0369

BEFORE: Ken Quesnelle
Presiding Member

Cathy Spoel
Member

DECISION AND ORDER AND PROCEDURAL ORDER NO. 3

The Ontario Energy Board (the “Board”), on its own motion under section 112.2 of the *Ontario Energy Board Act, 1998* (the “Act”), issued a Notice of Intention (Notice) stating that it intends to make an Order under sections 112.3 and 112.5 of the Act requiring Summitt Energy Management Inc. (“Summitt”) to comply with a number of enforceable provisions as defined in section 112.1 of the Act and to pay an administrative penalty in the amount of $15,000 for breaches of enforceable provisions. By way of letter dated September 7, 2011, Summitt, in accordance with the opportunity provided in the Notice, requested that the Board hold a hearing on this matter. The Board is therefore holding a hearing into this matter. The parties to this proceeding are Summitt and the staff members of the Board (assisted by external counsel) assigned to bring forward this matter (“Compliance”).

The Board issued Procedural Order No. 1 on November 22, 2011, which established December 22nd as a provisional date for the hearing of any motions pertaining to the hearing, as well as the schedule for filings pertaining to potential motions.

Summitt filed a Notice of Motion on December 15th, 2011. The Motion seeks various orders of the Board with respect to, among other things, the confidential treatment of certain information, requirements of the compliance staff to disclose certain information, a requirement for certain witness statements or summaries of anticipated oral evidence, contact information of intended witnesses, information pertaining to intended expert witnesses, the establishment of an interrogatory process, and the fixing of a hearing schedule according to a proposed timetable.

In response, Compliance filed its submission on December 19, 2011 addressing the matters raised in the motion and the relief sought by Summitt.

The motion was argued before the Board on December 22, 2011. Compliance agreed at the hearing to provide much of the information Summitt was requesting. The Board established January 13, 2012 as the date for the production of the “agreed to” information. Several issues, however, remained contested.

Decision on Motion

A. Additional Disclosure

Summitt’s original request for additional disclosure was itemized in Schedule “A” to its Notice of Motion. Since the Notice of Motion was filed the list of requested documents has become shorter, either because Compliance has agreed to provide the documents, or because Compliance has confirmed that the documents do not exist.

Compliance’s written submissions (para. 33) describe five categories of documents that it will not agree to provide absent an order from the Board:

(a) The audit working papers, investigator notes and memoranda;

(b) The names, addresses and telephone numbers of the individuals at the Board who instructed Ernst & Young (“E&Y”), to whom E&Y reported and with whom

E&Y discussed the auditor's process and findings, and from whom the auditors sought guidance and instruction (beyond Mr. Mustillo);

(c) The names, addresses and telephone numbers of the individuals at E&Y who conducted the audit of Summitt, who reviewed and commented upon the audit findings, who prepared and submitted the audit report to the Board and who discussed the audit and its findings with the Board (beyond Stephen Hack, the E&Y partner who signed the E&Y Report);

(d) Particulars of the audits of other energy retailers and marketers, including the identity of such retailers and marketers, the scope of the audit, copies of the audit reports and other materials put before decision-makers in those instances;

(e) Particulars and supporting reasons for the calculation of the administrative monetary and other penalties sought in each of the other Notices of Intention issued at or about the same time in respect of the concurrent audits of other energy retailers and marketers, as well as for the calculation of the administrative penalty sought in this proceeding.

<u>The test</u>

Although there was disagreement between the parties regarding what documents Compliance should be required to disclose, there was general agreement regarding the test the Board should apply in considering requests for disclosure. Both parties agreed that Summitt is entitled to disclosure that will allow it know the case against it, and thereby be provided with the opportunity to make full answer and defence.[1]

The case law is clear, however, that in an administrative process such as the current proceeding, Compliance is not necessarily required to disclose all potentially relevant material. As the Federal Court of Appeal held in *Ciba-Geigy Canada Ltd. v. Canada (Patented Medicine Price Review Board)*:

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[1] See, for example, *Howe v. Institute of Chartered Accountants of Ontario* (1994), 19 O.R. (3d) 483 (C.A.) and *Ontario (Human Rights Commission) v. Dofasco Inc.* (2001), 57 O.R. (3d) 693 (C.A.) (both cited in Summitt's factum); and the Board's decision on motion in EB-2010-0221 (Re Summitt Energy Management Inc.), dated August 23, 2010 (cited in Compliance's factum).

> Certainly, the subject of an excess price hearing is entitled to know the case against it, but it should not be permitted to obtain all the evidence which has come into the possession of the Board in carrying out its regulatory functions in the public interest on the sole ground that it may be relevant to the matter at hand. […]
>
> To require the Board to disclose all possibly relevant information gathered while fulfilling its regulatory obligations would unduly impede its work from an administrative standpoint.[2]

The test, therefore, is not whether a document is possibly relevant; the test is whether disclosure is required for Summitt to know the case to be met and to make full answer and defence.

Decision with respect to specific requests for disclosure

Names and contact information of individuals at the Board who dealt with Ernst &Young ("E&Y") with respect to this matter

Names and contact information of individuals at E&Y who worked on the audit

The Board will not require Compliance to provide any additional information regarding individuals at the Board who dealt with E&Y with respect to this matter.

As a practical matter, it appears that few if any people at the Board had substantive dealings with E&Y respecting this matter other than Mr. Lou Mustillo, who is known to Summitt and will be Compliance's first witness. Regardless, in the Board's view there is no compelling reason why Compliance should be required to provide the names of any individuals other than proposed witnesses.

Compliance is required to provide Summitt with materials sufficient to "allow it to know the case it is expected to meet with sufficient detail to enable it to mount an effective defence to the allegations contained in the notice of intention to make an order." It is not clear how the identity of persons at the Board who were involved in this case (other than the proposed witnesses) will assist Summitt in understanding the case it has to

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[2] [1994] 3 F.C.J. No 884, paras. 5-8.

meet. The onus will lie with Compliance to present evidence to the Board which satisfies the Board that Summitt has breached an enforceable provision of the Act.

For the same reasons (though subject to the additional ruling below) the Board will not require Compliance to provide Summitt with any additional names and contact information of individuals at E&Y who were involved in the preparation or review of the audit. The Board finds that additional contact information is not necessary to allow Summitt to know the case it has to defend.

Particulars of audits of other energy retailers

The Board will not require Compliance to provide any additional information with respect to audits conducted of other energy retailers.

Additional information regarding audit of energy retailers would be of little to no value in the current proceeding. Information relating to many recent Board compliance activities respecting other retailers is already a matter of public record, as are several Board decisions where notices of intention to make an order were contested. Summitt submitted that this information could be relevant to any potential due diligence defence it might choose to present. The Board is not convinced by this argument. Even to the extent that other energy retailers were thought to have or found to have breached similar enforceable provisions, any information relating to their due diligence practices would be of little to no benefit in the current proceeding. In any event, Summitt would have had to be aware of the practices of other retailers to rely on them as part of the basis of a due diligence defence. Disclosure by Compliance of this information after the fact will not be relevant if Summitt was not already aware of it, and if Summitt was aware of it, disclosure is not required.

Particulars relating to the calculation of administrative penalties sought against other energy retailers

The Board will not require Compliance to provide any additional information with respect to the calculation of the administrative penalties sought against any other party in other proceedings.

Compliance has already provided Summitt with the details on how Compliance determined what it regarded as an appropriate administrative penalty against Summitt

for the alleged breaches of enforceable provisions in this case. The administrative penalties that Compliance sought against other parties is also a matter of public record. In the event that the Board determines that one or more breaches of enforceable provisions have occurred in this case, the Board will determine the quantum of any administrative penalty. Compliance will present its view of an appropriate penalty, and Summitt will present its view. Presumably Compliance's argument in any penalty submissions will include details regarding how it determined what it views to be the appropriate penalty. This will of course not be binding on the Board, although it will be considered like any other submission before the Board. Details regarding how Compliance determined what it viewed as appropriate penalties in *other* proceedings, however, has no relevance to the current proceeding.

The audit working papers, investigator notes and memoranda

Compliance has already provided Summitt with all documents in its possession relating to the audit conducted by E&Y. What remains in dispute is the status of working papers, audit notes, etc., that may have been produced by employees of E&Y, but were never provided to Compliance (and which therefore have not been provided to Summitt).

Although employees of E&Y are not, of course, employees of the Board, they were retained by Compliance and appointed as inspectors pursuant to section 106 of the Act for the purpose of conducting the audit of Summitt. They were acting on behalf of Compliance. To the extent that any materials produced by E&Y meet the tests for disclosure as described above, they should be provided to Summitt. The Board does not consider the fact that the documents (to the extent they exist) were produced by people who do not work directly for Compliance to protect them from disclosure. The Board will consider Summitt's request for disclosure of documents in the possession of E&Y no differently than it would consider a request for similar documents produced by Compliance itself.

The Board has determined that the audit working papers, investigator notes and memoranda produced by E&Y but not given to Compliance may be relevant and therefore will order that they be provided to Summitt by Compliance.

The Board will rely on Compliance to obtain the documents and provide them to Summitt.

B. Interrogatories

While the Board indicated at the end of the motions day that it would make provisions for a limited interrogatory process, now that (in a decision being released concurrently) the Notice of Intention has been amended to clarify that the alleged contravention relates to physical placement, the Board expects that such interrogatories, if any, will be very limited in scope, as they must relate specifically to the allegations of non-compliance. The Board also expects that any interrogatories posed by Summitt will generally fall within the scope of the Board's findings relating to discovery: in other words the Board will not expect interrogatories in areas where the Board has declined Summitt's request for further information from Compliance.

The Board considers it necessary to make provision for the following procedural matters. The Board may issue further Procedural Orders from time to time.

THE BOARD THERFORE ORDERS THAT:

1. Compliance shall file any outstanding materials Ernst & Young prepared in regards to the Summitt audit with the Board, and copied to Summitt, on or before **April 16, 2012**.

2. If Summitt wishes information and material from Compliance that is in addition to the evidence filed with the Board shall request it by written interrogatories filed with the Board, and delivered to Compliance on or before **April 30, 2012**.

3. Compliance shall file with the Board complete responses to the interrogatories and deliver them to Summitt no later than **May 14, 2012.**

All filings to the Board must quote file number EB-2011-0316, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format filed through the Board's web portal at https://www.errr.ontarioenergyboard.ca/. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available you may e-mail your document to boardsec@ontarioenergyboard.ca.

Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies. All communications should be directed to the attention of the Board Secretary, and be received no later than **4:45 p.m.** on the required date.

ISSUED at Toronto, April 2, 2012
ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary